

EXHIBIT T

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1 UNITED STATES BANKRUPTCY COURT
2 FOR THE DISTRICT OF DELAWARE
3 IN RE: OWENS CORNING, et al., Chapter 11
4 Debtors Case Nos. 00-3837/00-3854
5 -----
6 IN RE: W.R. GRACE & CO., et al., Chapter 11
7 Debtors Case Nos. 01-1139/01-1200
8 -----
9 IN RE: USG CORPORATION,
10 a Delaware Corporation, Chapter 11
11 et al., Case Nos. 01-2094/01-2104
12 Debtors
13 -----
14 DEPOSITION UPON
15 ORAL EXAMINATION
16 OF
17 DAVID R. GROSS
18
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14 T R A N S C R I P T of the stenographic
15 notes of SUSAN E. GIOFFRE, a Notary Public and
16 Certified Shorthand Reporter of the State of New
17 Jersey, taken at the UNITED STATES DISTRICT
18 COURTHOUSE, 50 Walnut Street, Newark, New Jersey
19 on Monday, January 5, 2004, commencing at 9:00 a.m.
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2

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ALSO PRESENT:
THE HONORABLE ALFRED M. WOLIN, USDJ

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I N D E X

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25 Q You'll see on page 3 in the run-over

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1 part of the paragraph you write, "Mr. Hamlin
2 retained Budd Larner on or about December 18, 2001."

3 Do you see that?

4 A I do.

5 Q Do you recall, sir, whether that date
6 of December 18, 2001 was before you were contacted
7 by Judge Wolin to serve as his advisor in the five
8 asbestos cases?

9 A I think it was after, but I'm not sure.

10 Q In all events, they were close in time.
11 Am I correct?

12 A Yes, that's correct.

13 Q And did there come a time, sir, when
14 you advised Judge Wolin that you were serving as the
15 counsel to Judge Hamlin as the Futures rep in G-I?

9:34A 16 A I have no specific recollection of so
17 advising Judge Wolin, but I know that he was aware
18 of that appointment.

19 How he became aware of it is what I'm
20 not sure.

21 Q If I could just follow-up on your
22 answer briefly, you cannot -- can you recall a
23 conversation that you had with Judge Wolin in which
24 the fact of your service as the lawyer to Judge
25 Hamlin was discussed?

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1 A No.

2 Q How do you know he knew about it?

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3 A I'm not sure, frankly. I believe he
4 knew about it, but I don't have specific
5 recollection of my saying to Judge Wolin whenever it
6 was that I was engaged by Judge Hamlin that I was so
7 engaged.

9:35A 8 Q would you look at paragraph eight on
9 page 4 of your affidavit?

10 A Yes.

11 Q In the first sentence you say, "At all
12 relevant times, Judge Wolin was aware of my
13 representation of Mr. Hamlin in G-I Holdings."

14 Is that still your best belief?

15 A That is correct.

16 Q And when you say "at all relevant
17 times," what did you mean in that sentence?

18 A I assume I meant at times which in some
19 way might impact on the appointment by Judge Wolin,
20 but other than that, I don't know.

21 Q At all times relevant to the matter in
22 which you were submitting your affidavit?

23 A Yes.

24 MS. PARVER: Objection.

25 Q Before you accepted the position as an

□

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1 advisor to Judge Wolin, did you notify any of the
2 judges, either the bankruptcy judge or Judge Bassler
3 in the G-I case, that you were considering taking
4 that appointment?

5 A Judge Bassler, to go from him, his name
6 on, was not involved, to my knowledge, in the G-I
7 case at that time, so there would have been no

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8 notification to him.

9 I did not specifically, to my
10 recollection, notify Judge Gambardella, but I
11 believe, and I have not yet -- I have not reviewed
12 this, that in my submission to Judge Gambardella
13 that it was mentioned.

14 I also have the same belief that I
15 believe that Judge Gambardella was aware of it, but
16 I have no specific recollection of doing so.

9:36A 17 Q Now, sir, let me ask you, the other
18 advisors include Judge Dreier?

19 A Yes.

20 Q Judge Keefe?

21 A Correct.

22 Q Professor McGovern?

23 A Yes.

24 Q Did you disclose your service, your
25 role in G-I, to any of them at any time?

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1 A They were aware of it, I believe, but I
2 don't have any recollection of telling them, yes, I
3 am so appointed in G-I.

4 Q How do you know they were aware?

5 A I don't know. I believe they were.

6 Q Did you ever disclose your role in G-I
7 to any of the parties in Owens Corning?

8 A Mr. Robbins, I do not recall as I sit
9 here, whom the parties are in Owens Corning.

10 There are many, many parties and many,
11 many lawyers and I did participate to some extent in
12 some meetings with them. I don't remember

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13 disclosing anything specific to them.

14 Q All right. Now, broadening the
15 question a little bit, can you recall disclosing
16 your role in G-I to any of the parties in any of the
17 five asbestos cases?

9:37A 18 A I have no specific recollection of any
19 such disclosure. I believe, based on the public
20 information of the appointment, that people in all
21 of these cases read all of that public information
22 and would be so advised, but other than that, I
23 don't know.

24 I have no specific recollection of
25 saying to any of the parties that I am a special

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1 advisor to or I am representing the Futures
2 representative in G-I.

3 Q I'll come back to the public
4 disclosures in a little while.

5 A Okay.

6 Q Let me just ask, did you ever -- can
7 you recall whether you ever considered personally
8 disclosing to any of the parties in the five
9 asbestos cases the role you were serving in the G-I
10 case?

11 A I don't have any such recollection.

12 MR. BERNICK: Mr. Robbins, when you say
13 "parties" are you including counsel?

14 MR. ROBBINS: Yes. I appreciate that
15 qualification.

9:39A 16 Q With Mr. Bernick's qualification in
17 mind, does that change your answer?

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18 A Some of the lawyers, I believe --
19 strike that. I'm not sure.

20 The answer to that is -- the answer is
21 I have no specific recollection of saying to any of
22 the lawyers or their parties that I was, in fact, so
23 retained in G-I.

24 Q To your knowledge, sir, did Judge wolin
25 ever disclose to any of the parties or their lawyers

□

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1 in the five asbestos cases the role that you or
2 Judge Hamlin had in the G-I case?

3 A I don't know.

4 Q Let me ask you to turn -- look at your
5 affidavit again, Exhibit 1.

6 A Exhibit 1?

7 Q Yes. That's Gross Exhibit 1 for today.

8 A Yes.

9 Q Look, if you wouldn't mind, at
10 paragraph six. There's a sentence at the bottom of
11 the page that I'm going to just ask you to read to
12 yourself and then I've got a question or two about
13 it.

14 Do you see the sentence that begins
15 "Neither in our initial discussions"?

9:40A 16 A Yes.

17 Q Would you read that and just finish
18 that sentence and then I'll have a question.

19 (Witness reviewing exhibit.)

20 A Yes.

21 Q Did Judge wolin ever tell you that he
22 would not be seeking the type of advice reports or

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23 evaluations that you referred to in this sentence?

24 A By inference I believe that's what --

25 that is certainly what I understood my role to be,

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1 not to give him legal advice or anything such as

2 that mentioned here.

3 Did he ever specifically say to me "I

4 will not ask you for legal advice."

5 I have no such recollection.

6 Q Tell me what it is he did say that

7 caused you to draw that inference, if anything?

8 A My role, as I understood it as we went

9 on in this process, was to assist Judge Wolin with

10 the help of the other advisors in becoming more

11 conversant with the details of the asbestos

12 litigation and after that was done to assist, as I

13 hope I have done, in the mediation and settlement of

14 the five bankruptcy cases.

9:41A 15 MR. BERNICK: I'm sorry, could I have

16 that answer read back, please?

17 (Answer read back.)

18 Q Let me ask you, sir, just to follow up

19 for a minute, to become more -- you say more

20 conversant with the details of the asbestos

21 litigation, give me a flavor of what you're

22 referring to.

23 A The asbestos litigation, as I assume you

24 know, has gone on for many, many years.

25 I assumed one of the reasons that I had

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1 been asked by Judge Wolin to participate in this

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4 Do you believe that your role in the
5 G-I case puts you in conflict with your role as an
6 advisor in the five asbestos cases?

7 A No.

8 Q Tell me why.

9 A Because I believe in G-I I am a lawyer
10 representing -- local counsel representing the
11 Futures representative and in that capacity I can
12 advance and should assist the client, Judge Hamlin,
13 in advancing the best interests of himself on behalf
14 of the Futures representatives in the G-I case.

15 I don't believe that that in any way
16 has affected my appearing -- my involvement in the
17 five bankruptcies by way of indicating any prejudice
18 towards any party in the five bankruptcies.

19 I was not -- I did not consider myself
20 nor was I a lawyer, an advocate, if you will, in the
21 five bankruptcies.

22 I was assisting the Court, as I told
23 you initially, in the first phases of the
24 appointment and then acted as mediator/settlement
25 negotiator in the latter phases of that appointment.

□

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10:00A 1 Q If I could just follow up and make sure
2 I understand your answer, Mr. Gross.

3 A Sure.

4 Q I believe you used the phrase "local
5 counsel" to describe your position in G-I?

6 A Yes.

7 Q Is the fact of your service as local
8 counsel material to whether you believe you were --

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9 you have a conflict?

10 A No.

11 MS. PARVER: Objection.

12 Q So your answer would be the same even
13 if you were lead counsel?

14 A Yes.

15 Q Is the Futures rep in G-I a fiduciary
16 of the demand claims.

17 MR. BERNICK: In which case?

18 MR. ROBBINS: In G-I.

19 A I would assume so.

20 Q And does that fiduciary responsibility
21 extend to you as his lawyer?

22 A I think not. I think that that -- my
23 acting as his lawyer is as I have explained it to
24 you or as the legal representatives lawyer, doing
25 what I can to further the interests of the client I

□

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1 serve within the bounds of proper ethics.

10:01A 2 Q And the client you serve in G-I is
3 himself a fiduciary for his clients?

4 A I would believe so.

5 Q And do you believe you have served that
6 client vigorously in G-I?

7 A As well as I'm capable of, yes.

8 Q Now, just one second.

9 Let me ask you, after you were
10 appointed, Mr. Gross, I take it there were one or
11 more meetings of the advisors with Judge Wolin as a
12 group?

13 A Yes. After I was appointed in the
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14 advisory capacity, yes.

10:02A 15 Q Was there some particular way in which
16 those meetings were generally convened or did it.
17 depend on the particular meeting?

18 MS. PARVER: Objection.

19 A I think it depended on the particular
20 meeting. There was no set rules or procedures
21 followed in convening a meeting.

22 I think that's correct.

23 MS. PARVER: Again, Mr. Gross, if you
24 can...

25 A I think that's correct. There was no

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1 set or particular procedure.

2 Q From time to time when there were
3 meetings, did Judge Wolin send out materials for the
4 advisors to read in preparation for the meeting?

5 A I have no recollection of that.

6 Q What I'd like to show you -- I'm going
7 to be showing you in the course of the deposition a
8 series of fee applications.

9 You're familiar with those?

10:03A 10 A Yes.

11 Q You have filed them on behalf of you
12 and your different law firms.

13 Am I correct?

14 A Yes.

15 Q I'd like to show you the first of
16 these. This is the first fee application in the
17 five asbestos cases.

10:04A 18 (Notice of Filing of First Fee
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1 relating to your representation with Mr. Hamlin in
2 G-I.

3 To the extent it does, I object to the
4 use of this document, although I have it and I can
5 take a look for myself, but I do caution you in that
6 regard.

10:56A 7 A Is there a question?

8 Q Yes. The question is whether you
9 recognize this document?

10 A Yes.

11 Q What do you recognize it to be?

12 A That I produced it in response to the
13 order of Judge Wolin and that it is a memo to myself
14 from Whitney Chelnik, an associate in my office at
15 that time and presently.

16 Q And it purports to be a memo of the
17 meeting of January 18th that we've been talking
18 about?

19 A It does.

20 Q I just want to point to a couple of
21 items in it and just ask whether it refreshes your
22 recollection concerning subject matters that may
23 have been discussed at that January 18th meeting.

24 MR. BERNICK: I will interpose an
25 objection here to the use of at least a certain

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1 portion of this document which appears on page 2,
2 quote, "David Bernick's four issues."

3 I believe that's derived from work
4 product that was received and has been produced in

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5 this case and my acquiescence in the continuation of
6 this interrogation with respect to this document
7 should not be construed as a waiver of that work
8 product objection and I have a privileged objection
9 to any questions regarding that portion of the
10 document.

10:57A 11 Q Look, if you would -- if you wouldn't
12 mind, at Roman four that makes a reference to --
13 that states "If he were to follow the American
14 Thoracic Society ATS Guidelines, would the cost
15 alone drive out low-end screeners."

16 Do you see that sentence?

17 This is in Roman four on page 2.

18 A Yes, I'm sorry, I do. I didn't see
19 the --

20 Q Do you recall that subject being
21 discussed at the meeting of January 18th that we've
22 been talking about?

23 A I do not recall that subject being
24 discussed at that meeting, but I do recall that that
25 subject was generally discussed at some meetings.

□

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1 Q And without pinning you down to a
2 particular meeting, what can you tell me about the
3 nature of those discussions?

4 MR. BERNICK: You're not asking about
5 any meeting?

6 MR. ROBBINS: Correct.

10:58A 7 A My recollection is refreshed that at
8 one or more of these meetings Judge Wolin was
9 advised of what the American Thoracic Society

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3 MR. GOLDSTEIN: No, no. Do you want
4 him to finish the answer?

5 MR. ROBBINS: I would like him to.
6 I apologize for interrupting,
7 Mr. Gross.

8 A I was looking at the notes that were
9 above that line and I see there is a name, Mike
10 Thornton, who is a plaintiff's lawyer in Boston and
11 I guess someone else whose name I cannot decipher
12 about -- I'm relating Judge Zobel, who I know is
13 there, and these people who are Massachusetts
14 lawyers, in fact, there was some discussion about
15 those cases, but I don't remember exactly what the
16 cases were. It may have been just general asbestos
17 cases.

11:07A 18 Q Do you recall, sir, that on --

19 MR. GOLDSTEIN: Are you through?

20 THE WITNESS: Yes.

21 MR. GOLDSTEIN: There's a bunch of
22 notes there.

23 A I was just talking about things above
24 the line. If you want me to go on each one, I will.

25 Q Please.

□

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1 A Okay. There is a name Peter Barrett
2 who is obviously or appears to be a radiologist in
3 Massachusetts.

4 Q Do you remember what, if anything, was
5 discussed about him?

6 A Obviously, he had some thought about
7 pleural plaques, which is some part of the medical

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8 involvement in these cases.

9 The term below that under 2,
10 chrysotile, which is a form of asbestos, as to there
11 was some discussion as to whether it can cause
12 mesothelioma, which is a disease that comes from
13 this -- allegedly comes from these exposures.

14 There is the name Vicent Rogli,
15 R-o-g-l-i, who apparently said chrysotile does not
16 cause some form of the -- some disease.

11:08A 17 Q And that was part of the discussion?

18 A I guess so. I made notes about it.

19 Q Please continue.

20 MS. PARVER: I have an objection and I
21 move to strike the last answer.

22 The question is that part of the
23 discussion, then the answer "I guess so, they're
24 part of the notes," there is no foundation and it's
25 speculation.

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1 MR. MANCINO: I'll just note an
2 objection to the interruption of the witness' answer
3 because I don't believe he had completed his answer
4 to the question

5 A What I was doing, Mr. Robbins, was
6 trying to decipher my notes with the assumption that
7 they would be reflective of what was discussed.

8 whether it was discussed or not, I
9 don't know.

10 Q Let me try and lay a foundation because
11 I think Ms. Parver may have a valid concern.

12 Is it your practice when you take notes

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9 Corning.

10 I know there was a trial held by Judge
11 Wolin which dealt with substantive consolidation in
12 one of the bankruptcies.

13 I believe it was not Owens Corning, but
14 that's what I know about it. I didn't attend it nor
15 was I involved in it.

11:34A 16 Q Do you remember being present at a
17 meeting of advisors in which the subject of
18 substantive consolidation was taken up?

19 A I remember being present at some
20 meeting of the advisors when the term, which was one
21 that I wasn't particularly familiar with,
22 substantive consolidation, came up.

23 As to how and what it was, I don't
24 remember.

25 Q Do you recall being present at any

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1 meeting with Judge Wolin and the other advisors in
2 which the merits of the debtor's plan in Owens
3 Corning were discussed?

4 MS. PARVER: Objection to form

5 MR. SCHEIER: Objection to form.

6 One thing I did want to mention, you
7 asked a series of questions and you referred
8 generically to the advisors.

9 It's unclear to me whether you're
10 asking Mr. Gross about meetings where all the
11 advisors were present or a portion of the advisors
12 were present and I'd appreciate if you could clarify
13 that.

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11:35A 14 MS. PARVER: I think you referred to a
15 plan in Owens. I think there has been more than one
16 filing of a plan.
17 MR. ROBBINS: Indeed, so let me ask and
18 let me take into account both objections because
19 they are both well founded.
20 Q At any time where one or more advisors
21 to Judge Wolin were present with the judge, was the
22 subject matter of any plan proposed by the debtor in
23 Owens Corning discussed?
24 A I have no recollection of that,
25 Mr. Robbins.

□

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1 Q I would like to show you the -- I think
2 it's the fourth gross fee application, but
3 unfortunately, it doesn't bear that name.
4 It's actually the first fee application
5 for D. R. Gross & Associates.
11:36A 6 A A short-lived institution.
7 Q How long did it live?
8 A Two months and eleven days.
9 (First Application of D.R. Gross &
10 Associates, LLC for Compensation is received
11 and marked as Gross Exhibit 12 for
12 Identification.)
13 (Witness reviewing exhibit.)
14 Q I owe you an apology.
15 what I need is the first Saiber
16 Schlesinger fee application and we will mark
17 that 13.

11:37A 18 MR. BERNICK: This past round is not --
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11 A Eight?
12 Q I'm sorry, page 4, paragraph eight.
13 A Yes.
14 Q Do you see the last sentence of
15 paragraph eight that reads, "Moreover, the cases
16 before Judge wolin in the G-I Holdings bankruptcy
17 have all been subjects of ongoing media interest
18 particularly in national publications serving the
19 asbestos litigation community."
20 Do you see that?
21 A Yes, I do.
22 Q Can you identify the national
23 publications that you were referring to in that
24 sentence?
12:19P 25 A Yes.
□

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1 Q Please do.
2 A The two asbestos reporters, Mealey's
3 and Andrews, The Wall Street Journal, the New York
4 Times, and I think there is something called The
5 Deal.
6 Q The Daily Deal?
7 A Yes. In other words, those are the
8 publications that come to mind.
9 Q At or about the time -- now this
10 sentence talks about the cases before Judge wolin in
11 the G-I bankruptcy have all been subjects.
12 Now I want to narrow this a little bit.
13 Your -- let me strike that.
14 Judge Hamlin's appointment as the
15 Futures rep in G-I, in what national publications,

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16 if any, was that reported?

12:20P 17 A I don't know. I would assume Mealey's
18 and Andrews, but I don't know other than that.

19 Q You don't recall actually having seen
20 those?

21 A I do not.

22 Q So you didn't read about his
23 appointment in there?

24 A I knew about his appointment.

25 Q But you didn't read it in any of those

□

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1 publications?

2 A I don't recall. I read them on
3 occasion. I do not read them religiously.

4 Q How often do they come out?

5 A Once a week.

6 Q How often do you read them?

7 A Once every couple of weeks or so when
8 it comes across my desk.

9 Q What's the last one you can recall
10 reading?

11 A The last one?

12 Q Yes. How long ago?

13 A Before the Christmas vacation.

14 Q Can you recall any of the articles in
15 that issue?

16 A No. We get a -- the answer is no.

17 Q When you were retained as the counsel
18 to the Futures representative, was that, to your
19 knowledge, published in any national publications?

12:21P 20 A My assumption is yes. I don't recall

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21 anything specific.

22 Q You didn't see any?

23 A Not that I can recall to you now.

24 Q I want to show you a few documents that
25 were issued or filed in the early stages of the G-I

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1 after Judge Hamlin's appointment starting with an
2 October 10, 2001 appointment of Judge Hamlin.

3 MR. SCHEIER: Larry, are you going to
4 go through a series of publicly-filed documents?

5 MR. ROBBINS: Yes.

6 (Order Appointing Legal Representative
7 of Present and Future Holders of Asbestos
8 Related Demands in G-I's Chapter 11 Case
9 is received and marked as Gross Exhibit 14 for
10 Identification.)

12:23P 11 MR. ROBBINS: Actually, why don't I
12 mark all of these at one time so I have them before
13 us.

14 I'm going to be marking as exhibits the
15 order appointing the legal representative
16 October 10, 2001, then a letter from Judge Hamlin to
17 Chief Judge Rosemary Gambardella dated October 26,
18 2001. Mark that as 15.

19 The first one was 14, the second one is
20 15.

21 Then an application of the legal
22 representative of present and future holders which
23 is January 8th.

24 This is to authorize the employment of
25 Budd Larner. We will mark that as 16.

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10 A Yes.

11 Q In what case?

12 A At least three or four of them.

13 Q I'm sorry?

14 A At least three or four cases.

15 Q Can you identify any of those?

16 A Not as we sit here, no. I'm confused

17 as to which ones he attended -- he was the Futures

18 rep in.

19 Q How about Mr. McMonagle?

20 A In one case.

21 Q Do you know which case he's the Futures

22 rep in?

12:55P 23 A I think Owens Corning, but I'm not

24 sure.

25 Q How about Mr. Trafelet?

□

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1 A In one case.

2 Q Can you identify it?

3 A No.

4 Q Is Professor McGovern a Futures rep in

5 any case?

6 A Not to my knowledge.

7 Q In what capacity was he attending these

8 meetings?

9 A As a mediator for Judge Wolin. I would

10 say for Judge Wolin. I'm not sure. I'm not sure

11 what capacity officially he had, if any, in these

12 cases.

13 Professor McGovern was involved in the

14 attempt to settle many of these cases and his

SG010504.ASC

15 capacity in attending the meetings I really don't --

16 I just don't know.

17 Q Are you able to recall the discussions

18 of any particular meeting?

12:56P 19 MR. BERNICK: You're now talking about

20 these Futures rep meetings?

21 MR. ROBBINS: Yes.

22 A I can tell you generally what the

23 discussions were and how they were presented and

24 also can tell you that the main purpose of them, as

25 I understood it, was to deal with the pending

□

Gross-Direct

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1 legislation which I am advised is not to be

2 discussed here today, but that was as I understood

3 it the main purpose of it and whether, in fact, the

4 Futures rep should take -- the Futures

5 representatives as a group should take any position

6 on the pending legislation.

7 And before the meetings began -- I'm

8 sorry, before that subject was addressed, that being

9 the legislation that was pending, there was often a

10 report by the Futures rep as to the progress of the

11 individual bankruptcies by way of where it was, was

12 there a plan presented, were there settlement

13 negotiations, those kinds of things.

14 And also, I recall that at one of the

15 meetings, and I don't know which one, but we did

16 produce copies of my notes of that meeting, there

17 was -- there were presentations made by various

18 entities as to how they would deal with the

19 presentation of claims to the various trusts.

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25 trusts and these trusts to be of dealing with the

Gross-Direct

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1 claims presentation that they had.

2 They were people who had done this

3 before and people who were in the process of

4 desiring to do it now.

5 That was at one of the meetings.

12:59P 6 Q Can you recall any contributions to any
7 of the meetings that you personally made?

8 A Other than with respect to the
9 legislation and things such as that which we are not
10 supposed to discuss or which I am not -- I am going
11 under the assumption is not to be discussed.

12 Q Well, let's put that to one side for a
13 moment.

14 A Okay. I participated in discussions
15 certainly, I can tell you that. With what
16 specificity? No.

17 I also didn't attend all of the
18 meetings. I think one meeting I attended by phone
19 partially.

20 Q I'm sorry?

21 A I did not attend personally all of the
22 meetings. I think one of them I participated in by
23 telephone partially and then had to break off.

1:00P 24 Q Do you recall at any of the meetings
25 with other -- with Futures reps there were

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1 discussions of trust distribution procedures?

2 A Yes.

3 Q What can you recall about that?

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4 A What I just told you about the fact
5 that there were these people who were trying to
6 secure the appointment to facilitate the
7 presentation of claims to trust.

8 Each of the individual -- "each" is
9 probably too strong a term.

10 As I understood it and as I understand
11 it now, the individual trusts have their own
12 particular procedures built in and some -- and I
13 believe they are different with respect to what the
14 requirements of the procedures are.

15 MR. ROBBINS: Are you all taking the
16 position that I can ask no questions concerning the
17 discussions about taking a position on pending
18 legislation?

1:01P 19 MR. BERNICK: My recollection is the
20 same as Mr. Gross', but in light of the breadth of
21 your question to us and in light of the fact that we
22 are going to be breaking in a couple of minutes, why
23 don't you let us talk about that amongst ourselves
24 before we say yes to so broad a question?

25 MR. ROBBINS: For what it is worth, it

□

Gross-Direct

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1 is the only subject on this area that I'd like to
2 ask him about and then I'm prepared to move and you
3 can take that under advisement.

4 (Luncheon recess taken.)

5

6

7

8

SG010504.ASC

1 thought and had told you that he thought you could
2 be of assistance in helping the Court and the
3 parties overcome procedural and operational
4 complexities?

5 A Correct.

6 Q Did you have any further understanding
7 of what particular procedural or operational
8 complexities Judge Wolin had in mind at the time he
9 asked you to become an advisor?

2:53P 10 A No, I don't know what was in his mind
11 except as I've indicated here.

12 Q In retrospect, outside of your efforts
13 in mediating, putting that aside, do you believe
14 that the work you've done as advisor has, in fact,
15 avoided or overcome any procedural or operational
16 complexities in these asbestos bankruptcies?

17 A I'm unaware of anything other than what
18 I've told you I've done, which is the mediation
19 effort, the settlement effort, and the initial
20 bringing of the Court -- making the Court aware of
21 what's gone on in the asbestos litigation.

22 Q Do you believe on that last point, the
23 educational efforts that you made to try and get the
24 Court up to speed, do you believe that any of that
25 has aided in avoiding any procedural or operational

□

Gross-Cross

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1 complexities?

2 A I don't know what Judge Wolin used or
3 didn't use with respect to what we put before him to
4 rule as he did. I was not involved in his rulings
5 as you understand my position ever.

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6 Q At the time Judge Wolin first asked you
7 to participate as an advisor, did he set out any
8 guidelines or restrictions for you to govern your
9 conduct as an advisor?

2:54P 10 A No.

11 Q So he didn't instruct you, for example,
12 not to discuss anything ex parte with the parties in
13 the five bankruptcies?

14 Is that right?

15 A Ex parte?

16 Q Yes.

17 A What do you mean?

18 Q Did Judge Wolin instruct you that while
19 as an advisor working under his direction he didn't
20 want you off having contacts or discussions with
21 parties that he wasn't there to supervise?

22 A No. Part of my role was to do exactly
23 that.

24 Q Did he specifically ask you to do that?

25 A You asked me that before. I don't

□

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1 remember any specific direction by the Court "You
2 will do this."

3 That's what my role -- what my role
4 particularly, others differed, evolved in.

5 Q Did he -- I gather he also didn't ask
6 you not to have any conversations outside of his
7 presence with counsel for the various parties in the
8 five bankruptcies?

9 A He did not.

10 Q Did he ask you not to have any

SG010504.ASC

1 recall that were discussed in those meetings today,
2 at least the list that I have of the meetings were
3 the 706 panel, we talked about that?

4 A Yes.

5 Q And the ATS guidelines, correct, it was
6 another subject --

7 MS. PARVER: I object.

8 Q -- that we discussed this morning?

9 A Those were two of the many things
10 discussed.

11 Q There was 5-24G?

12 A Yes.

13 Q Are there other topics without --

4:16P 14 MS. PARVER: And I object to that.

15 MR. DEVEREAUX: Can I finish my
16 question, counsel?

17 MS. PARVER: I object to the colloquy
18 by counsel. I object to your speaking statements.
19 Just put your question, but it's an improper and
20 mischaracterization of the testimony of this
21 morning.

22 Q Can you think, as you sit here today,
23 sir, of other topics regardless of in what meetings
24 with Judge Wolin or the other advisors that may have
25 come up, other topics that were discussed?

□

Gross-Cross

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1 MR. GOLDSTEIN: Objection to the form
2 of the question.

3 MS. PARVER: Objection; form,
4 speculation.

5 A Can I answer?

SG010504.ASC

6 There were discussions about the types
7 of these disease processes that evolved from
8 asbestos exposure.

9 There were discussions about the types
10 of asbestos fiber.

11 There were discussions about all of
12 the -- many of the things that would come up and had
13 come up and I said this morning the MDL, I recall
14 saying the MDL applications and things such as that.

15 For me to try and iterate everything
16 that was discussed in these meetings that took place
17 for a reasonable -- a long period of time, this is
18 not possible except as I've indicated to some extent
19 in the notes which you have.

4:18P 20 Q Do you have a recollection as to
21 whether or not there was a discussion at any of
22 these discussions with Judge Wolin or the other
23 advisors as to what types of claims by asbestos
24 personal injury claims would be compensable?

25 A Yes.

□

Gross-Cross

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1 MR. BERNICK: I object to form.
2 Compensable where?

3 MR. ROBBINS: The objection is noted.

4 Q What was the discussion, if you recall,
5 sir, about whether or not certain types of claims by
6 personal injury claims would be compensable?

7 A That the judge was bound by the laws of
8 the individual states that set up the compensability
9 of the claims.

10 Q Outside of the issues as to whether or

SG010504.ASC

11 not state substantive tort law would govern, is
12 there any other context in which you discussed
13 whether particular types of asbestos claims might be
14 compensable?

15 MR. SCHEIER: Objection to form.

16 A Not that I was involved in.

17 Q Do you recall any discussions about the
18 merits of any defenses that any of the debtors or
19 other parties were raising to any personal injury
20 asbestos claims in the context of your discussions
21 with Judge Wolin or the other advisors?

4:19P 22 A There were discussions about the types
23 of defenses that were offered such as fiber defense
24 and the like as far.

25 As the merits of those defenses, no, I

□

Gross-Cross

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1 have no recollection of any discussion at any time
2 about whether they were good or bad or valid or
3 invalid defenses.

4 Q In terms of the fiber defense, would
5 you include what is known as the chrysotile defense?

6 A Yes.

7 Q Do you recall during the course of the
8 meetings that you participated in with Judge Wolin
9 and other court advisors, anyone making statements
10 about whether or not that was a valid -- in their
11 view a valid or invalid defense?

12 A I do not.

13 Q Do you recall discussions with Judge
14 Wolin and the other advisors about the value of any
15 claims for personal injury?

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25 Q Correct.

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1 MR. GOLDSTEIN: The bottom of the
2 page?

4:28P 3 Q The bottom of page 1, right, your
4 entry.

5 A Okay. Yes.

6 Q That entry reads, quote, "Telephone
7 calls to F. McGovern, Judge Wolin and experts Re:
8 Statistics," close quote.

9 Do you see that, sir?

10 A I do.

11 Q Do you recall who the experts were that
12 you referenced in this time entry?

13 A No.

14 MR. SCHEIER: I'm looking at the time
15 entries for that date and --

16 THE WITNESS: It's a different one.
17 It's the one at the bottom. There is one at the
18 top.

19 MR. SCHEIER: Can we get some sort of
20 identifying number?

21 MR. DEVEREAUX: Page 1 from Exhibit C,
22 time entries?

23 A Was I looking at the right one?

24 Q Yes, you go it.

25 A Okay.

Gross-Cross

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1 MR. DEVEREAUX: Everybody there?

2 MS. PARVER: Yes.

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3 Q You don't recall, sir?

4 A I do not.

5 Q Do you recall what discussions you had
6 as an advisor to Judge Wolin regarding statistics?

4:29P 7 MS. PARVER: Object to form.

8 A I recall discussions with -- in the
9 early stages of the meetings with Judge Wolin which
10 dealt with the use of statistics in the prediction
11 of potential claims that there were such
12 methodologies.

13 Q As a way to predict the incidents and
14 claims in the future that would arise?

15 A Yes.

16 Q I know you don't recall who the experts
17 were who you met with on March 6th or talked with on
18 March 6, '02.

19 Do you recall any experts that you met
20 with during the course of advising Judge Wolin as
21 part of your duties as an advisor?

22 A Other than those who were experts or
23 parties?

24 Q No, no. I'm including experts or
25 parties.

U

Gross-Cross

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1 A I don't think I'm supposed to tell you
2 that. I'm not even sure that I met with them,
3 frankly.

4 I know I met with people. I know that
5 there were certain folks who were experts for
6 parties, but I don't recall -- at this stage,
7 Mr. Devereaux, I don't recall meeting with any

SG010504.ASC

25 MR. DEVEREAUX: I have no copies. This

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1 is the time records distributed at the break.

2 A Okay, that's fine.

3 Q And these are records where -- have
4 you, sir, or someone on your behalf interlineated
5 who the redacted names are to indicate who it was
6 you were meeting with?

7 A Someone on my behalf did that,
8 Mr. Devereaux. I did not do it. It was only done
9 at the last day. I don't know when it was done.

5:36P 10 Q And to the best of your knowledge,
11 this is the extent of the information that you
12 have available to show who it was, who those
13 names withheld from certain billing statements
14 recite?

15 A That is correct.

16 MR. DEVEREAUX: That's it

17 MR. BERNICK: Are you done, Scott?

18 MR. DEVEREAUX: Um-hum.

19 MR. BERNICK: I'm sorry, you have to
20 say it orally for the court reporter.

21 MR. DEVEREAUX: It's not up to the
22 court reporter, it's up to you.

23 MR. BERNICK: I understand that.

24 MR. DEVEREAUX: Yes.

25 MR. BERNICK: Thank you.

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1 CROSS-EXAMINATION BY MR. MANCINO:

2

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3 Q Mr. Gross, thank you for your patience.
4 Look at Gross Exhibits 8 and 10,
5 please.

6 A If someone will give them to me, I will
7 certainly look at them.

8 MR. MANCINO: How much time do we have
9 that Mr. Devereaux took?

10 MS. PARVER: About fourteen minutes

11 MR. DEVEREAUX: And so I gave my six
12 minutes to Mr. Mancino.

5:37P

13
14 BY MR. MANCINO:

15 Q Do you have Gross Exhibits 8 and 10?

16 A I've got 10 only.

17 Q Okay, 10 is regarding the meeting with
18 Judge Wolin on February 27, 2002?

19 A That is correct.

20 Q And I will represent to you that Gross
21 Exhibit 8 is Whitney Chelnik's notes of a meeting on
22 January 23, 2002.

23 A Okay.

24 Q And the meeting is on January 8, 2002.

25 A I don't have it in front of me, but I

□

Gross-Cross

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1 accept your representation.

2 Q In these preliminary meetings of the
3 advisors with Judge Wolin, did you discuss topics
4 that were relevant in general to the five asbestos
5 cases?

6 A Yes.

7 Q What topics were those?

SG010504.ASC

8 A I have already answered them on more
9 than one occasion that I can recall.

10 They were the topics of the status of
11 the litigation, the issues that were involved in the
12 litigation, who were the people who might be helpful
13 to the Court in bringing the Court more knowledge
14 about the litigation, the 706 panel and whether it
15 was efficacious in this situation.

16 I, personally, did not discuss much
17 about the bankruptcy -- I mean, I shouldn't --
18 you're asking me what I discussed or the group
19 discussed?

5:39P 20 Q The group discussed.

21 A There was discussion about past and
22 ongoing asbestos bankruptcies. That's the kind of
23 thing that was discussed.

24 Q Okay. With respect to Gross Exhibit 8
25 on the first page, DRG3696 under Roman 2, "706

□

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1 Panel," and then there are the main issues to be
2 addressed by the 706 panel.

3 Do you see that, sir?

4 A I do.

5 Q And the four issues that are listed
6 there?

7 A Yes.

8 Q Okay. Was the discussion of that -- of
9 those issues to be addressed by the 706 panel a
10 discussion that related generally to all five of the
11 asbestos cases?

12 A I believe so.

SG010504.ASC

18 testify in response to Mr. Mancino's questions.

19 A Those are the things I remember as
20 we're sitting here, Mr. Mancino.

21 Q Respect to the discussions with Judge
22 wolin concerning the positions taken by the parties
23 in the Grace case, what positions taken by the
24 parties in the Grace case did you discuss with Judge
25 wolin?

□

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1 A Their settlement positions.

2 Q As to the case in its entirety?

5:42P

3 A Yes.

4 Q Did you have discussions with Judge
5 wolin concerning issues relating to W. R. Grace's
6 position as to how the its bankruptcy should believe
7 managed?

8 A I was more interested, I think, in --
9 more involved in the settlement discussions rather
10 than the management of the bankruptcy.

11 Q Okay. But those were --

12 A I don't remember. I'm sure there -- I
13 don't remember.

14 Q But in terms of the broad topics, there
15 were settlement discussions concerning the
16 disposition of the entire Grace bankruptcy?

17 A Yes.

18 Q And all issues involved in it?

19 A I would think so.

20 Q But that was your understanding?

21 A Yes.

22 Q Looking at Gross Exhibit 8 on page 3,

SG010504.ASC

23 it's the January 23, '02 memorandum, you will see
24 under Roman six there is -- Roman six right near the
25 middle of the page, it says "W. R. Grace will be

□

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1 divided into four parts."

2 Was that a topic of discussion at your
3 meeting on January 18, 2002 with the advisors and
4 Judge Wolin?

5:43P

5 A I do not have a specific recollection
6 of these things, but I am assuming since they were
7 recorded here, yes.

8 Q And you had that expectation that Ms.
9 Chelnik would record accurately, at least to the
10 best of her ability, the topics discussed at the
11 meeting. Right?

12 MR. GOLDSTEIN: Objection to form.

13 A I told Ms. Chelnik to attend the
14 meeting and to make notes of the meeting.

15 Q Now, with respect to again Exhibit 8 at
16 Roman six, you will see the paragraph that I will
17 read into the record.

18 "The consensus at the meeting was that
19 Judge Wolin must take care of a fraudulent transfer
20 issue first before proceeding on with the general
21 asbestos/bankruptcy matters. Therefore, it must be
22 determined whether Judge Wolin can take the case or
23 if it will be handled by a bankruptcy judge. Also,
24 is a jury required? In Judge Wolin's opinion, he
25 could have the fraudulent transfer claims tried by

□

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1 the summer, possibly schedule a trial for July or
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2 August."

5:44P 3 A Yes.

4 Q I read that correctly?

5 A Yes, you did.

6 Q Do you recall that discussion?

7 A I know there was a discussion about the
8 fraudulent transfer case, yes, and I know -- yes, I
9 do.

10 Q And then it -- Ms. Chelnik's memo says
11 "The consensus at the meeting was that Judge Wolin
12 must take care of the fraudulent transfer issue
13 first."

14 what was discussed along those lines?

15 A I don't know but -- I don't know, but
16 that's what -- again, I don't know what was
17 discussed first and I don't have a recollection of
18 the discussion except as it's set forth here.

19 Q So your best recollection of the
20 discussion is as what is set forth on page 3 in
21 Gross Exhibit 8?

22 A It's not really a recollection. I'm
23 sorry, I'm not trying to quibble with you,
24 Mr. Mancino.

25 It's just that the notes say what they

□

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1 say, quite obviously, and if Ms. Chelnik properly
2 recorded them, then these are some of the things
3 that were discussed.

4 Q Okay. Under point four, "Personal
5 Injury" again on page 3 of Gross Exhibit 8.

5:46P 6 A Point four?

EXHIBIT U

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

IN RE: ARMSTRONG WORLD : Chapter 11
INDUSTRIES, INC., et al., : Case Nos. 00471,
: 00-4469, 00-4470
Debtors. :

IN RE: W.R. GRACE & CO., : Chapter 11
et al., : Case Nos. 01-1139
: through 01-1200
Debtors. :

IN RE: FEDERAL MOGUL, : Chapter 11
GLOBAL, INC., T & N, : Case Nos. 01-10578,
LIMITED, et al., : et al.
: :
Debtors. :

IN RE: USG CORPORATION, : Chapter 11
a Delaware Corporation, : Case Nos. 01-2094
et al., : through 01-2104
: :
Debtors. :

IN RE: OWENS-CORNING, : Chapter 11
et al., : Delaware Bankruptcy
: Case Nos. 00-3837
Debtors. : through 00-3854

DEPOSITION UPON
ORAL EXAMINATION
OF
JOHN E. KEEFE, SR.

T R A N S C R I P T of the deposition of
JOHN E. KEEFE, SR., before AUDREY ZABAWA, a
Certified Shorthand Reporter and Notary Public of
the State of New Jersey, at the MARTIN LUTHER KING
JR. FEDERAL BUILDING, 50 Walnut Street, Newark, New
Jersey, on Tuesday, January 6, 2004, commencing at
4:50 p.m., pursuant to Notice.

Keefe - Direct/Orseck

6 (Pages 18 to 21)

<p>18</p> <p>1 Q Did Judge Wolin ever, formally or</p> <p>2 informally, at some subsequent time subsequent to</p> <p>3 the issuance of Exhibit 1 advise you that the scope</p> <p>4 of your responsibilities or authority were to be</p> <p>5 restricted or curtailed in any respect?</p> <p>6 A Not that I can recall.</p> <p>7 Q So is it your understanding that you</p> <p>8 continue to act as a member of the Asbestos</p> <p>9 Management Committee in the capacity that is</p> <p>10 described in Exhibit 1?</p> <p>11 MR. BRODWY: Objection to the form of</p> <p>12 the question.</p> <p>13 A Yes.</p> <p>14 Q I didn't hear the answer.</p> <p>15 MR. FAIRBANKS: Could we have the same</p> <p>16 arrangement as we had in the other deposition that</p> <p>17 if one of the persons on this side of the table</p> <p>18 makes an objection it goes for all of us?</p> <p>19 MR. ORSECK: Fine with me.</p> <p>20 Q Let me show you now what we've marked</p> <p>21 as Hamlin Exhibit 2, which is a March 19, 2002 order</p> <p>22 from Judge Wolin in the Five Cases.</p> <p>23 A Okay.</p> <p>24 Q I am just going to lean over here. Do</p> <p>25 you see the language that says that to that point at</p>	<p>20</p> <p>1 that means under the bankruptcy.</p> <p>2 A That's right.</p> <p>3 Q Did you at the time of this order in</p> <p>4 March after there had been one or more meetings</p> <p>5 among the advisors, did you have a different or</p> <p>6 expanded -- well, leave it at different, did you</p> <p>7 have a different understanding as to the scope of</p> <p>8 your responsibilities or authority than you did back</p> <p>9 in December of 2001?</p> <p>10 A I don't think so.</p> <p>11 Q Rather than my fishing around, why</p> <p>12 don't you as best you can describe it, as of</p> <p>13 December or March, what is your best understanding</p> <p>14 of your responsibilities as an advisor?</p> <p>15 A Let me put it this way. My</p> <p>16 recollection of my activities on this advisory</p> <p>17 committee in the sense of giving any advice in terms</p> <p>18 of opinions were limited to basically two areas.</p> <p>19 The first area was a question of whether the</p> <p>20 committee felt based upon upon our examination of</p> <p>21 certain briefs and the law whether a removal by Ford</p> <p>22 Motor Company of several cases to the district court</p> <p>23 should be remanded to the state courts. The second</p> <p>24 activity I was involved in in any depth was an</p> <p>25 inquiry into whether a 706 panel should be formed;</p>
<p>19</p> <p>1 least, I think the quote is, "it appearing that the</p> <p>2 advisors are functioning in a manner in all respects</p> <p>3 similar to examiners as provided for in the</p> <p>4 Bankruptcy Code," and then it lists portions of</p> <p>5 Chapter 11. Do you see that?</p> <p>6 A Yes, I do.</p> <p>7 Q Do you have an understanding of what</p> <p>8 that meant, that is to say that you were functioning</p> <p>9 in all respects similar to examiners under the</p> <p>10 Bankruptcy Code?</p> <p>11 A I don't think I recall contemplating</p> <p>12 that at all, no.</p> <p>13 Q As you sit here today, does that seem</p> <p>14 to you to be an accurate representation of the</p> <p>15 capacity in which you were serving at least up</p> <p>16 through March 19th of 2002?</p> <p>17 MR. FAIRBANKS: Objection to the form</p> <p>18 of the question. I don't think there's any basis</p> <p>19 for that question. He said he didn't understand</p> <p>20 what that meant; didn't he?</p> <p>21 A No. I said I didn't contemplate at the</p> <p>22 time that the order came in that I was operating in</p> <p>23 that capacity or not. I just don't know.</p> <p>24 MR. FAIRBANKS: I don't know if the</p> <p>25 record shows that he has an understanding of what</p>	<p>21</p> <p>1 and, if so, for what reasons and what were the</p> <p>2 criteria under which we thought the panel could</p> <p>3 operation and effectively decide issues, and I truly</p> <p>4 do not remember any other advice that I was asked to</p> <p>5 give.</p> <p>6 Q Is it your understanding that as a</p> <p>7 member of the Asbestos Management Committee you were</p> <p>8 required to be neutral with respect to the various</p> <p>9 parties in the Five Cases?</p> <p>10 A Absolutely.</p> <p>11 Q Why is that?</p> <p>12 A Because we were advisors to the Court,</p> <p>13 and the Court was to be neutral, so obviously the</p> <p>14 advice had to be neutral as well. Just like a law</p> <p>15 clerk or a magistrate.</p> <p>16 MR. ORSECK: All right. Let's mark</p> <p>17 Keefe Exhibit 1, please.</p> <p>18 (Keefe-1, John E. Keefe, Sr. affidavit,</p> <p>19 was received and marked for identification.)</p> <p>20 Q Judge Keefe, can you identify for the</p> <p>21 record what's been marked as Keefe Exhibit 1?</p> <p>22 A It's my affidavit filed --</p> <p>23 MR. STIEFEL: Is this 3 or 1?</p> <p>24 MR. ORSECK: No, it's Keefe-1. If I</p> <p>25 can just make it clear for the record, we have so</p>

Keefe - Direct/Orseck

12 (Pages 42 to 45)

<p>42</p> <p>1 you be so kind to explain what these handwritten</p> <p>2 notes reflect? Are though notes from a particular</p> <p>3 meeting or --</p> <p>4 MR. ORSECK: Judge Dreier testified</p> <p>5 that these are notes from the four meetings, and</p> <p>6 perhaps, although it wasn't exactly clear to me,</p> <p>7 from a fifth meeting that may have preceded the four</p> <p>8 meetings, but at least I know they are so dated that</p> <p>9 there are notes here from the four meetings.</p> <p>10 MR. FAIRBANKS: There are not dates</p> <p>11 that show all four meetings.</p> <p>12 MR. ORSECK: That's true. There are</p> <p>13 only dates with respect to the January 18th,</p> <p>14 February 27th, May 17th meeting, and then there are</p> <p>15 notes of a November 19th meeting at the end, which I</p> <p>16 don't believe Judge Keefe to have attended, and I</p> <p>17 will not ask him about those.</p> <p>18 Q Okay. On the first page, WAD 001,</p> <p>19 there is an entry that I believe, I will represent</p> <p>20 that Judge Dreier has said, "Says use 502C</p> <p>21 estimates, not specific bar dates."</p> <p>22 Do you know what 502C is?</p> <p>23 A Yes, in general, but I am not a</p> <p>24 bankruptcy expert so --</p> <p>25 Q My question is does this in any way</p>	<p>44</p> <p>1 treatment." Does that spark any recollection of a</p> <p>2 substantive discussion at one of the four meetings?</p> <p>3 A No.</p> <p>4 Q Let me turn to page seven -- let me</p> <p>5 back up for a moment. Page six at the top says,</p> <p>6 2/27/02, so I understand that page and page seven to</p> <p>7 relate to the February 27 meeting.</p> <p>8 A Okay.</p> <p>9 Q At the top, there is a name that</p> <p>10 appears to say Dr. Victor Rogalie or Rosalie. Do</p> <p>11 you see that?</p> <p>12 A I do.</p> <p>13 Q Do you know why his name might be in</p> <p>14 Judge Dreier's notes?</p> <p>15 A I think this is the meeting I referred</p> <p>16 to before when we had plaintiffs' counsel and</p> <p>17 defense counsel come and talk to us about the</p> <p>18 so-called hot issues in asbestos litigation, in all</p> <p>19 categories of asbestos injury, and I think they were</p> <p>20 mentioning the names of doctors that were prominent</p> <p>21 at least from their point of view, whether it be</p> <p>22 defense or plaintiffs, and I do remember the name</p> <p>23 Rogalie. Don't ask me if he's defense or plaintiff.</p> <p>24 Q Do you see over on the left, I believe</p> <p>25 that says, "Al Parnell"?</p>
<p>43</p> <p>1 spark a recollection in any way of the issue of 502C</p> <p>2 estimates being discussed at one or more of the four</p> <p>3 meetings?</p> <p>4 A No, I don't.</p> <p>5 Q Okay. Let me ask you to turn to the</p> <p>6 second page, and about two-thirds of the way down --</p> <p>7 MS. BROWDY: Let me interrupt you,</p> <p>8 counsel. I believe that Judge Dreier testified</p> <p>9 yesterday that as to pages two and three, he</p> <p>10 believed that those involved the context of</p> <p>11 potential mediation, and I believe those to be off</p> <p>12 limits.</p> <p>13 MR. ORSECK: Okay. I will confess</p> <p>14 that I just can't remember at this point, but I am</p> <p>15 going to just take your word for it at this point.</p> <p>16 Okay. So you are saying that that's with respect</p> <p>17 to page three as well?</p> <p>18 MR. TACCONELLI: You'd moved onto page</p> <p>19 four during his deposition yesterday. You bypassed</p> <p>20 pages two and three.</p> <p>21 Q All right. Let me ask you. I think at</p> <p>22 this point I remember there are certain marginalia</p> <p>23 that Judge Dreier said were appropriate. On page</p> <p>24 five, all the way on the left above the doodle, it</p> <p>25 says, according to Judge Dreier, "Section 524G</p>	<p>45</p> <p>1 A Yes.</p> <p>2 Q "D attorney"?</p> <p>3 A Right.</p> <p>4 Q Do you know why that notation is there?</p> <p>5 A Sure. Mr. Parnell was at the meeting,</p> <p>6 for part of the meeting. He wasn't there for the</p> <p>7 entire meeting.</p> <p>8 Q Do you know why he was invited to the</p> <p>9 meeting?</p> <p>10 A Yes.</p> <p>11 Q Why was that?</p> <p>12 A My understanding was he was going to</p> <p>13 discuss these issues from a defense perspective.</p> <p>14 Q And did somebody also come to discuss</p> <p>15 these issues from the plaintiffs' perspective?</p> <p>16 A Yes.</p> <p>17 Q Did you have any discussions at any of</p> <p>18 the four meetings as to the purpose of inviting</p> <p>19 lawyers to provide a plaintiffs' perspective and a</p> <p>20 defendants' perspective?</p> <p>21 A I think it was in the context of</p> <p>22 allowing Judge Wolin at some point in time to decide</p> <p>23 whether a 706 panel could feasibly be put together;</p> <p>24 and, if so, what issues could they possibly resolve</p> <p>25 in the context of what has happened over the last 20</p>

Keefe - Direct/Orseck

13 (Pages 46 to 49)

<p>46</p> <p>1 some years in asbestos litigation.</p> <p>2 Q Did the plaintiffs' and the defendants'</p> <p>3 side attorneys express views as to the usefulness of</p> <p>4 a 706 panel?</p> <p>5 A They did not. Not to my recollection.</p> <p>6 Q I perhaps misunderstood. What were</p> <p>7 they providing information on, if anything?</p> <p>8 A They were providing information on what</p> <p>9 doctors were being permitted to testify to in</p> <p>10 certain jurisdictions with respect to pleural</p> <p>11 plaques, whether in certain jurisdictions that was</p> <p>12 considered to be a disease without symptoms,</p> <p>13 compensable. With respect to asbestosis, they were</p> <p>14 discussing whether some jurisdictions adhered to the</p> <p>15 American Thoracic Society requirements for testimony</p> <p>16 with respect to readings of x-rays; whether they</p> <p>17 required B readers, whether I/O was acceptable in</p> <p>18 some jurisdictions and not in others; whether some</p> <p>19 jurisdictions with respect to asbestosis required</p> <p>20 abnormal PFTs, or could the diagnosis of asbestosis</p> <p>21 be made basically on x-ray. With respect to cancer</p> <p>22 cases, I remember discussion with respect to what,</p> <p>23 if any, defenses could be offered for that, and, of</p> <p>24 course, the chrysotile fiber defenses were</p> <p>25 mentioned, and I recall some discussion -- there was</p>	<p>48</p> <p>1 A No, I didn't.</p> <p>2 MS. BROWDY: Off the record for a</p> <p>3 second.</p> <p>4 (Discussion off the record.)</p> <p>5 Q Judge Keefe, do you recall any</p> <p>6 discussion at any of the four meetings that related</p> <p>7 to the question of whether an estimation hearing</p> <p>8 ought to be held in advance of plan confirmation or</p> <p>9 at the same time as plan confirmation?</p> <p>10 A I really can't recall that.</p> <p>11 MR. ORSECK: Okay. All right. Which</p> <p>12 Keefe exhibit are we up to?</p> <p>13 THE COURT REPORTER: Keefe-5.</p> <p>14 (Keefe-5, two pages of handwritten</p> <p>15 notes, was received and marked for identification.)</p> <p>16 Q Judge Keefe, can you identify what's</p> <p>17 been marked as Exhibit 5?</p> <p>18 A That's my handwriting of a proposed</p> <p>19 agenda for the January 18th meeting concerning</p> <p>20 discussions on 706 panels.</p> <p>21 Q Did you share this with anyone?</p> <p>22 A I don't think I did.</p> <p>23 Q Do you recall whether you made these</p> <p>24 notes or drafted this agenda in advance of the</p> <p>25 meeting?</p>
<p>47</p> <p>1 a doctor from Boston who believed that you had to</p> <p>2 have pleural plaques in order to diagnose</p> <p>3 mesothelioma. We went through every kind of cancer</p> <p>4 cases, what are the issues, what are jurisdictions</p> <p>5 allowing in terms of admissibility of evidence</p> <p>6 because we knew that the Erie Doctrine was going to</p> <p>7 obviously have play, but the question was whether</p> <p>8 the 706 Daubert type setting, the federal court</p> <p>9 could narrow the field, narrow the scope.</p> <p>10 Q Did any of the advisors or Judge Wolin</p> <p>11 put questions to either of the two sets of</p> <p>12 attorneys?</p> <p>13 A I think we all did.</p> <p>14 Q How long did each, I am going to call</p> <p>15 it presentation, last by the defense side and the</p> <p>16 plaintiffs' side?</p> <p>17 MR. DOBSON: Object to the form.</p> <p>18 A I don't know. It was pretty lengthy,</p> <p>19 and as I recollect, they came in separately. They</p> <p>20 weren't in the same room together.</p> <p>21 Q Do you know if any of the parties to</p> <p>22 the Five Cases were advised or notified beforehand</p> <p>23 that these presentations were occurring?</p> <p>24 A I have no idea.</p> <p>25 Q You didn't do so; is that correct?</p>	<p>49</p> <p>1 A Oh, I did, yeah, I definitely did.</p> <p>2 Q There is a paren after the agenda that</p> <p>3 says, "not addressed"?</p> <p>4 A Right.</p> <p>5 Q What does that mean?</p> <p>6 A It means that -- can I go back just a</p> <p>7 second? I thought I was going to actually chair the</p> <p>8 meeting, because it became obvious to me after the</p> <p>9 first meeting that Judge Wolin was going to</p> <p>10 basically focus my services on the asbestos-related</p> <p>11 disease part of the case and insurance coverage</p> <p>12 stuff. I did not hold myself out to be a bankruptcy</p> <p>13 expert, and I thought he had suggested that I create</p> <p>14 an agenda for the meeting and simply go through it.</p> <p>15 I wasn't supposed to disseminate it, but just kind</p> <p>16 of outline the issues that I thought might want to</p> <p>17 be addressed. As it turned out, I didn't run the</p> <p>18 meeting, Judge Wolin did, and although we discussed,</p> <p>19 you know, the various issues within this agenda, the</p> <p>20 agenda itself was not followed.</p> <p>21 Q I see. The first numbered point says,</p> <p>22 as I read it, "Is this going to be a 706 panel a la</p> <p>23 Pointer or a 104 panel a la Baxter (Judy Jones)."</p> <p>24 Have I read that correctly?</p> <p>25 A You have.</p>

Keefe - Direct/Orseck

15 (Pages 54 to 57)

54

1 Q All right. Back to the first page of
2 Keefe-5, you were on number four I think?

3 A No, I think we did number four by
4 referring to the next page.

5 Q Okay. Well, I think it says under
6 number four, "Establish a conflict questionnaire
7 after initial screening?" Have I read that
8 correctly?

9 A That's correct.

10 Q Did you discuss with the group the idea
11 of creating a conflict questionnaire?

12 A No, we never even talked about who
13 would screen them.

14 Q Okay. What about number five?

15 A "Identify what committee members will
16 conduct a search and who will be contacted."

17 Q Was that discussed at all?

18 A No.

19 Q Number six?

20 A "Once we have ID'd an expert, how do we
21 handle issue of compensation?"

22 Q Was that discussed among the group?

23 A No.

24 Q And I can't quite read the bottom of
25 number seven. Can you?

56

1 advisor, the Lynch Martin firm represented a number
2 of claimants in cases that were removed from state
3 court to federal court and assigned to Judge Wolin?

4 A I didn't.

5 Q Did you know that those cases were then
6 remanded back to state court by Judge Wolin?

7 A I didn't.

8 Q You are not aware of that?

9 A No, I'm not.

10 MR. ORSECK: I thank you for your time.

11 I don't have any more questions.

12 CROSS-EXAMINATION BY MR. ST. JEANOS:

13 Q Judge, Chris St. Jeanos from Willkie
14 Farr. I just have a few. In your affidavit which
15 was marked as Exhibit 1, you state that regarding
16 the four meetings that you had with the Asbestos
17 Management Committee, as I recall, "The discussions
18 involved issues of concern to the Court with respect
19 to the management of complex issues presented by the
20 bankruptcy matters and how the advisors could be
21 assistance to the Court in that regard." You have
22 testified to a number of the things you recall being
23 discussed at the four meetings?

24 A Right.

25 Q Is there anything that you recall being

55

1 A I think it says, "Will experts be
2 afforded assistance of counsel, and who will pay for
3 counsel?"

4 Q I take it that probably wasn't
5 discussed either; right?

6 A No, right.

7 Q You are aware, I imagine, that a
8 recusal motion has been filed in this matter;
9 correct?

10 A Yes, I am aware of it.

11 Q Have you discussed the merits of the
12 recusal motion with any person?

13 A No.

14 Q Have you spoken with Judge Wolin at all
15 regarding the --

16 A Just out in the hall.

17 MR. FAIRBANKS: Objection. You have
18 asked that, and you got the answer.

19 MR. ORSECK: Okay. I need to check my
20 notes, but to me this is a good time for a
21 five-minute break if that's okay, and I may be about
22 through.

23 (Break taken.)

24 Q Judge Keefe, I am about through. Were
25 you aware that at the time you were serving as an

57

1 discussed at those meetings that we haven't yet
2 covered yet as you can recall?

3 A Substantive issues or procedural
4 issues?

5 Q Let's start with substantive issues?

6 A I don't recall any other substantive
7 issues.

8 Q Other than the issues we have discussed
9 so far today?

10 A Right.

11 Q There were procedural issues discussed
12 though?

13 A I think there was some discussion as to
14 what matters he thought he would want to decide
15 first, and I think it was the W.R. Grace matter,
16 and, yeah.

17 Q Go ahead. I didn't want to cut you
18 off.

19 A And I recall him telling me that he
20 would like to have some insurance issues addressed
21 shortly thereafter.

22 Q Did the judge say why he wanted to
23 decide the Grace case first?

24 A No.

25 Q With respect to the Grace case, did he

Keefe - Cross/St. Jeanos

16 (Pages 58 to 61)

<p>58</p> <p>1 say what it was that he wanted to decide in that</p> <p>2 case?</p> <p>3 A I got the understanding that he was</p> <p>4 going to decide the -- was it the Sealed Air, yes,</p> <p>5 Sealed Air. There was a fraudulent conveyance</p> <p>6 issue.</p> <p>7 Q He wasn't referring to, as you</p> <p>8 understood it, getting the plan approved or</p> <p>9 anything, completing the case?</p> <p>10 A Oh, no, no.</p> <p>11 Q Other than the four meetings, have you</p> <p>12 attended any meetings with any one or more of the</p> <p>13 other advisors relating to the Five Cases?</p> <p>14 A No.</p> <p>15 Q You mentioned before, I think, that you</p> <p>16 wished you had taken notes at these meetings?</p> <p>17 A Yes.</p> <p>18 Q Can you tell me why?</p> <p>19 A I would have a better recollection of</p> <p>20 what was said in more detail. I don't think I'm</p> <p>21 being very helpful here. I am doing the best I can.</p> <p>22 Q Do you agree that that's one of the</p> <p>23 problems with having ex parte off-the-record</p> <p>24 meetings?</p> <p>25 A No.</p>	<p>60</p> <p>1 A No, I really didn't.</p> <p>2 Q We've discussed or you have testified</p> <p>3 to the document you received from Mr. Gross relating</p> <p>4 to the G-I decision?</p> <p>5 A Yes.</p> <p>6 Q Do you know why you asked to review</p> <p>7 that?</p> <p>8 A Do I know why?</p> <p>9 Q Yes.</p> <p>10 A I don't know why. I mean I don't know</p> <p>11 what was in Mr. Gross's mind when he sent me the</p> <p>12 case. He thought it would be of interest for our</p> <p>13 discussions.</p> <p>14 Q Was it discussed at all in any of the</p> <p>15 discussions that you had in the four meetings?</p> <p>16 A I don't recall it being specifically</p> <p>17 discussed at all.</p> <p>18 MR. ORSECK: I want to mark one of the</p> <p>19 lists, both of the lists that you provided with your</p> <p>20 documents.</p> <p>21 (Keefe-6, bates JK0000003 through</p> <p>22 JK0000006, was received and marked for</p> <p>23 identification.)</p> <p>24 Q I do apologize. I have one copy.</p> <p>25 MS. BROWDY: Can you give us bates</p>
<p>59</p> <p>1 MR. FAIRBANKS: Objection.</p> <p>2 MR. DOSSON: Objection.</p> <p>3 Q Sorry. It's late.</p> <p>4 A Good try.</p> <p>5 Q I may have missed this because I</p> <p>6 stepped out in the beginning for a moment, but when</p> <p>7 you were asked to serve as a consultant in these</p> <p>8 cases, did you conduct a conflict check?</p> <p>9 A Yes.</p> <p>10 Q Did that conflict check include your</p> <p>11 prior representation -- did it relate to parties in</p> <p>12 cases other than parties who were specifically</p> <p>13 parties in the Five Cases?</p> <p>14 A No.</p> <p>15 Q So in other words, did you look to</p> <p>16 check to see whether a party not currently a party</p> <p>17 in this case nevertheless had an interest in the</p> <p>18 case that might create a conflict?</p> <p>19 A No, because I was satisfied that I knew</p> <p>20 nothing about the asbestos litigation in our office</p> <p>21 and didn't intend to and had no financial interest</p> <p>22 in.</p> <p>23 Q Did you conduct any sort of formal</p> <p>24 conflict check through your computer system at the</p> <p>25 firm?</p>	<p>61</p> <p>1 numbers?</p> <p>2 MR. St. JEANOS: Sure. It's JK6 --</p> <p>3 well, it's 4, 3 and 6, JK4, 3 and 6, which is a</p> <p>4 collection of documents that relate to files, I</p> <p>5 believe, on Judge Keefe's computer system. I will</p> <p>6 let him clarify that.</p> <p>7 A That's right.</p> <p>8 Q Can you tell us what this list</p> <p>9 represents?</p> <p>10 A They represent whatever information I</p> <p>11 either put into the system or copied into the</p> <p>12 system.</p> <p>13 Q And the system is the system at your</p> <p>14 offices?</p> <p>15 A Yes.</p> <p>16 Q The computer system?</p> <p>17 A Right.</p> <p>18 Q And are these documents that were also</p> <p>19 produced, or you just produced the list?</p> <p>20 A No, I just produced the list.</p> <p>21 Q Do the documents that are listed here</p> <p>22 relate to your work in the Five Cases?</p> <p>23 A Yes.</p> <p>24 Q And I see that some of them at least</p> <p>25 relate to or appear to relate to your work as a</p>

EXHIBIT V

MCGOVERN.V1

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UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

IN RE: ARMSTRONG WORLD INDUSTRIES, INC., et al.,	CHAPTER 11 Case Nos. 00-4471 00-4469 00-4470
Debtors.	

IN RE: W.R. GRACE & CO., et al.,	CHAPTER 11 Case No. 01-1139 through 01-1200
Debtors.	

IN RE: FEDERAL-MOGUL GLOBAL, INC., T & N LIMITED, et al.,	CHAPTER 11 Case Nos. 01-10578, et al
Debtors.	

IN RE: USG CORPORATION, a Delaware Corporation, et al.,	CHAPTER 11 Case Nos. 01-2094 through 01-2104
Debtors.	

IN RE: OWENS CORNING, et al.,	CHAPTER 11 Case Nos. 00-3837 through 00-3854
Debtors.	

TRANSCRIPT of the deposition testimony
of FRANCIS MC GOVERN, taken by and before
JACQUELINE KASHMER, a Certified Shorthand
Reporter and Notary Public of the State of New
Jersey, at the Martin Luther King, Jr., Federal
Building and U.S. Courthouse, 50 Walnut Street,
Newark, New Jersey, on Tuesday, January 6, 2004,
commencing at 2:10 p.m.

JACQUELINE KASHMER, C.S.R., C.R.R.
P. O. Box 12
Pittstown, New Jersey 08867
(908) 996-6800

MCGOVERN.V1

17 A. I really feel very uncomfortable. I felt
18 so uncomfortable that I haven't billed for that
19 time.

20 Q. That's pretty uncomfortable. Do
21 you recall meeting with -- you know Elizabeth
22 Magner?

23 A. Yes.

24 Q. Do you recall meeting with Miss
25 Magner in relation to her representation of the

□

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McGovern - Direct - Devereaux

1 SAC in these five asbestos cases in meetings that
2 were not related to mediation efforts that you
3 were conducting?

4 A. I don't remember any specific instances.
5 All the instances that I can think of were
6 generated by a mediation effort, but it certainly
7 is possible we talked about non-mediation issues
8 but, I don't remember anything specific as to
9 that that comes to mind.

10 Q. How about, now Mr. Inselbuch is
11 counsel for the ACC, Miss Magner is counsel for
12 the SAC. Have you met with individual
13 plaintiffs' lawyers who may have clients who are
14 part of the SAC or the ACC and discussed with
15 them issues related to these five asbestos cases,
16 again, that weren't mediation driven?

17 A. Judge Wolin wanted to meet with all of the
18 principal players and I helped to arrange a

MCGOVERN.V1

15 tell me about those discussions?

16 A. I don't remember any specific
17 conversations outside of the mediation. I'm
18 sure I met with them. I just don't remember
19 anything specific.

20 Q. Can't recall any details? Do you
21 have -- can you make any estimates as to how much
22 or how often you have met with them, even if you
23 can't recall any of the particulars?

24 A. No, not really. That was part of my
25 problem was dividing up what I was doing with the

□

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McGovern - Direct - Devereaux

1 vast bulk of it was related to mediation.

2 Q. Okay. Are there any records that
3 you know of that you could go back and find out
4 when or how often you met with Mr. Inselbuch or
5 his colleagues related to the five cases but not
6 related to the mediations?

7 A. No, other than the fact that I would have
8 to make a guess when I met with Mr. Inselbuch. I
9 would know that I met with Mr. Inselbuch, I could
10 do that, and then I'd have to make some type of
11 judgment call as to what percentage of the time
12 was related to the mediation and what percentage
13 of the time was related to the court adviser, and
14 that was the difficulty I was having.

15 Q. And you don't feel comfortable
16 trying to make that estimate here?

MCGOVERN.V1

20 A. I didn't do any investigations.
21 Q. Okay. Do you recall whether he
22 asked you to refrain from talking with any
23 potential witnesses who may come before the Court
24 as part of the five asbestos cases as part of
25 your role as an adviser?

□

13

McGovern - Direct - Devereaux

1 A. No.
2 Q. Were there any limitations at all
3 that you can recall Judge Wolin at any time
4 imposing on what you should do as an adviser in
5 the five cases?
6 A. I think there was an understanding that we
7 had as to what the role would be and I've been
8 trying to think of how to explain it. It's
9 analogous to a role that I've served in many
10 circumstances as a reporter or an adviser or a
11 consultant to a committee of judges or a
12 commission where one acts as a person who is
13 available to answer questions about issues,
14 arguments, history, procedures, but not as
15 someone who is there to express an opinion
16 concerning those.

17 In other words, when you serve as
18 an adviser to these types of committees, judges
19 typically aren't interested in what your opinion
20 is. They're more interested in making sure
21 they're aware of what the issues are and what the

MCGOVERN.V1

22 arguments are for and against and, so, my
23 understanding of what he was asking me to do was
24 to be available to him to answer questions that
25 he had that typically would not be answerable

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McGovern - Direct - Devereaux

1 from the published literature, having more to do
2 with custom or practice or what was done in a
3 particular case in the past or who certain people
4 would be in order to get him up the learning
5 curve as to the nature of the asbestos
6 litigation, mass torts in general, and then
7 specifically the asbestos bankruptcies.

8 Q. I think I understand. Let me ask a
9 few questions, see if we can draw that out.

10 In particular here and based on
11 some of the testimony that's been given already,
12 would it be fair to say that part of that was to
13 understand generally what went on in the tort
14 system in asbestos litigation?

15 A. That would be part of it, yes.

16 Q. And part of that would be what
17 types of defenses gets raised?

18 A. Yes.

19 Q. And what types of arguments made by
20 the plaintiffs about exposures?

21 A. Yes.

22 Q. What sort of value the plaintiffs
23 recover in cases either at settlement or trials?

MCGOVERN.V1

9 kinds of conversations that take place?

10 A. The reason I was having a problem with
11 strengths and weaknesses, that sort of suggests
12 some type of normative judgment and the way I get
13 around that as a mediator or as a neutral is by
14 saying, okay, these people would argue this and
15 these people would argue that rather than
16 interjecting what I think is a strength or
17 weakness.

18 Q. So, picking up that theme, so, on
19 these issues that were otherwise talked about
20 that were discussed, including 502C estimation,
21 including 706 panel, including some of other
22 issues, what you would do is explain here's what
23 the proponents would say the strengths of this
24 approach is, here's what the detractors would
25 say, here's what the negatives were, and that's

□

39

McGovern - Direct - Devereaux

1 what would provide information and discussion, if
2 you will?

3 A. I would do as complete a job as I could of
4 what the arguments were on both sides,
5 absolutely.

6 Q. Okay. And that's in the context of
7 these adviser meetings and helping Judge Wolin?

8 A. I don't know how much depth we went in at
9 any one of those meetings. I just don't
10 remember. There were very few of them and I

MCGOVERN.V1

15 advisers and the Judge for handling these
16 bankruptcies?

17 A. Could you repeat that question?

18 (The last question is read back.)

19 A. No.

20 Q. On page two in the second full
21 paragraph Judge Dreier lays out in his view,
22 starts, the first sentence anyway, talking about
23 the benefit of the three-part grouping that he's
24 described above. Do you see that, sir?

25 A. Yes.

□

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McGovern - Direct - Devereaux

1 Q. Do you recall other advisers like
2 Judge Dreier giving to Judge Wolin their view of
3 the benefits or detriments of certain ways
4 proceeding in these bankruptcy, such as Judge
5 Dreier seems to do here?

6 A. No.

7 Q. In September of last year Judge
8 Wolin issued an order wherein he asked you and
9 Mr. Gross to lead up, if you will, the creation
10 of what he called working committees. Are you
11 familiar with that generally?

12 A. I don't remember the time but I know there
13 was a discussion about committees of parties,
14 yes.

15 Q. Do you recall Judge Wolin's order
16 on that issue?

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12 was, but I remember there was an issue raised
13 about the amount of money that the futures
14 representative was spending and there was a
15 discussion as to techniques that the futures
16 representative could use to make sure that the
17 funds that they were expending were completely
18 justifiable.

19 Q. Okay. Can you recall any other
20 instances in which people complained how they
21 handled the particular issue?

22 A. There was some discussion of the
23 appointment. There was some discussion about the
24 selection of trustees for subsequent trusts or
25 board members, and the methodology by which that

□

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McGovern - Cross - Robbins

1 would be conducted, and the characteristics and
2 background that would be worthwhile for people
3 who were serving as directors, if appropriate.
4 Some of the bankruptcies didn't
5 have directors and used their trusts so there
6 would be trustees, how many there would be, that
7 type of thing and, so, there would be a
8 discussion where someone would say, well, I'm in
9 the process of trying to decide whether or not
10 it's three or five.

11 Q. I'm going to list a few subjects, I
12 don't mean to suggest they were ever discussed.
13 In fact, that's going to be my question.